

EPA Gets Year To Rethink Maine Tribal Water Decisions

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Law360 (December 4, 2018, 7:58 PM EST) -- A Maine federal judge has granted the [U.S. Environmental Protection Agency](#)'s request that its decisions disapproving certain Maine quality standards for waters near tribal lands be remanded to the agency, giving the Trump administration until next December to come up with a new ruling.

The EPA had [told the court in July](#) that it had “decided to change, and not to defend” its 2015 decisions against some Maine Clean Water Act standards the state claims had improperly heightened tribal water quality standards, asking the court to remand the case to the agency for reconsideration.

U.S. District Judge Jon D. Levy agreed to the request on Monday and stayed the case until Dec. 3, 2019, for the agency to formulate a new decision. The judge said that the agency had shown a remand was justified based on its plan “to make substantive changes to the original agency decision that is challenged in this case” as well as by the replacement of key EPA officials, including Andrew Wheeler taking over as acting administrator following the resignation of Scott Pruitt.

The judge rejected arguments by the Penobscot Nation and the [Houlton Band](#) of Maliseet Indians, which intervened in the case in 2016, to block the EPA's rethink, saying **the tribes failed to show how the agency's interpretations of various federal laws are connected with the issues the agency will address in the remand.**

“It is not unusual for questions of statutory interpretation and the exercise of agency discretion to overlap. Thus, I am not persuaded that bifurcation [along those lines] is

warranted or that a remand will unduly prejudice the tribes' ability to press their statutory arguments," the judge said.

But the judge also said that the so-called Maine Rule — federal water quality standards put in place in January 2017 to protect tribal sustenance fishing rights — will remain in effect during the remand, ordering that the EPA "shall not take any action that would terminate or undermine the effectiveness of the Maine Rule without prior court approval."

Kaighn Smith Jr. of [Drummond Woodsum](#), which represents the Penobscot Nation, said maintaining that status quo is "very important to the Penobscot Nation, and it signals to the EPA that the court is going to take very seriously any rollback of the protective water quality standards currently in place for these sustenance fishing rights."

Smith noted that the judge also accepted the tribe's proposed counterclaim against the state, and that "tees up the most important issue for litigation and resolution, which is the right of the Penobscot Nation to have water quality to support its sustenance fishery."

Representatives for the Houlton Band and Maine were not immediately available for comment Tuesday. The federal government does not comment on pending litigation.

Maine filed its complaint in 2014, alleging that the EPA under the Obama administration had failed to timely act on its water quality standards. The next year, the EPA approved some and disapproved others, prompting Maine to amend its complaint.

The "Maine Rule" was developed by the federal government after Maine didn't propose any replacements for those disapproved standards, and went into effect in January 2017.

Last year, Judge Levy granted the EPA's request to stay the case so that, under the new Trump administration, the agency could think about whether it wanted to reconsider the

decisions challenged by Maine. Ultimately, though, the EPA said in December 2017 that it had decided not to "withdraw or otherwise change any of the decisions."

But after settlement talks didn't work out, the EPA switched course, asking the court in July for a voluntary remand of its 2015 decisions.

In September, Maine agreed with the EPA's remand request, but also [asked that the decisions be vacated](#), saying that leaving them in place "would allow the challenged decisions, which EPA has now disavowed, to remain in effect indefinitely causing ongoing regulatory disruption and harm to Maine."

And the state also opposed the Penobscot Nation's bid to add a counterclaim against Maine for declaratory relief establishing that Maine has "a duty to recognize and protect the sustenance fishing rights of PN members in setting state water quality standards."

In his order Monday, Judge Levy declined to vacate the EPA's earlier decisions, saying that doing so would improperly allow a rule to be repealed without public notice or judicial review on the merits, and that it was "not evident" that an April 2018 opinion letter from the [U.S. Department of the Interior](#) — cited by the EPA as support for its remand bid — actually conflicted with the agency's 2015 rulings.

The judge also ruled that the Penobscot Nation's counterclaim was acceptable as it "seeks only an inverse declaration from the one already sought by Maine" and therefore "does not substantively alter the case."

Maine is represented by Attorney General Janet T. Mills and Scott W. Boak, Gerald D. Reid and Christopher C. Taub of the state Attorney General's Office.

The EPA is represented by acting Assistant Attorney General Jeffrey H. Wood and David A. Carson, Halsey B. Frank and John G. Osborn of the [U.S. Department of Justice](#).

The Houlton Band of Maliseet Indians is represented by Graydon G. Stevens of [Kelly Remmel & Zimmerman](#), and Cory J. Albright, Jane G. Steadman and Riyaz A. Kanji of [Kanji & Katzen PLLC](#).

The Penobscot Nation is represented by David M. Kallin and Kaighn Smith Jr. of Drummond Woodsum.

The case is Maine et al. v. Wheeler et al., case number [1:14-cv-00264](#), in the U.S. District Court for the District of Maine.